A **DAMIANUS GEORGE ALUDAH & ORS**

v.

MALAYAN BANKING BERHAD

B COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
CLEMENT SKINNER JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: S-02-1255-2010]
C 12 DECEMBER 2013

CIVIL PROCEDURE: *Cause of action - Claim for liability - Trustees - Constructive trustee - Ground of knowing receipt - Whether cause of action on accessory liability - Whether defendant acted dishonestly*

D ***TRUSTS:*** *Trustees - Constructive trustee - Ground of knowing receipt - Whether cause of action on accessory liability - Whether defendant acted honestly*

This was an appeal by the appellants/defendants ('the defendants') E against the decision of the High Court in allowing the claim of the respondent/plaintiff ('the plaintiff') and entering judgment against the defendants. The plaintiff had pursued two causes of action against the defendants at the High Court, *ie*, that they were liable to account for the sum of RM4,125,000 as constructive trustee F on the ground of knowing receipt and that the sum of RM4,125,000 or RM206,205 was money had and received by the second and fourth defendants to the plaintiff's use. In this appeal, the defendants complained that the plaintiff did not pursue Isamaju Sdn Bhd ('Isamaju') as constructive trustee who received the bulk G of the money but instead, decided to pursue the second and fourth defendants as constructive trustees on the ground of knowing receipt. The defendants contended, *inter alia*, that: (i) the grounds of judgment showed that the Judicial Commissioner ('JC') assumed the cause of action was on accessory liability; (ii) they H did not receive the monies comprised in the cashier's cheque for their own benefit, in which, out of the RM4,125,000 they only benefited RM206,250 which was paid as their fees; (iii) the plaintiff was not the beneficial owner of the money; and (iv) the JC had erred in finding that the second defendant had behaved I dishonestly when he failed to make proper enquiries, after being put on notice about the cashier's cheque. Further, it was argued

that the High Court made no finding of dishonesty against the third defendant and therefore, it was wrong to find liability against him. The defendants contended that no case had been made against them for money had and received for the plaintiff's use as it was not the fourth defendant who received the monies under the cashier's cheque but it was Isamaju who had done so. The plaintiff, on the other hand, claimed it was unconscionable for the second or fourth defendant to retain the benefit of the cashier's cheque, which was premised on the dishonest or improper conduct of the second defendant.

Held (dismissing appeal)
Per Clement Skinner JCA delivering the judgment of the court:

(1) The JC did not assume that the plaintiff's cause of action was on accessory liability. A reading of para. 23 of the statement of claim showed that the plaintiff's claim based on the ground of knowing receipt was a further or alternative claim. (para 24)

(2) The second defendant, knowing that the cashier's cheque was 'not negotiable' and was made payable to the Director of Lands and Surveys for a substantial amount of money, in payment of land premium, would have been put on notice as to the propriety of Isamaju's instructions to cash the cashier's cheque and be paid the proceeds. By refraining from making the necessary enquiries but instead going to the plaintiff to open an account so as to facilitate the payment of the proceeds of the cashier's cheque into account, was clearly an accessory to and had rendered knowing assistance to Isamaju's fraudulent conduct of seeking to be paid the monies meant to be paid to the Director of Lands and Surveys and which conduct was clearly in breach of trust. (para 27)

(3) The second and fourth defendants had acted 'as a channel through which funds disposed of in breach of constructive trust reach other quarters'. The judge found that the second defendant's conduct was dishonest and relied on *Royal Brunei Airlines Sdn Bhd v. Tan* on what was meant by dishonesty. (para 29)

(4) A stranger or agent who receives some part of the trust property cannot escape liability. Even though the second and fourth defendants did not retain the whole of the monies that was paid into their client's account, they certainly benefited from having received all of the trust monies as they kept a portion of it as their fees. In having obtained payment of the monies into their client's account, the JC found that the second defendant had behaved dishonestly which was related to the whole transaction. The fact that the bulk of the monies were then paid out to Isamaju did not detract from the fact that the second defendant had acted dishonestly and had benefited from the receipt of those monies by charging their fees. (paras 31 & 32)

(5) A solicitor cannot disregard the instructions of his client no matter how wrongful the instructions of his client might be. On the evidence, it shows that the second defendant knew that the cashier's cheque was 'not negotiable' and that the payee of the cashier's cheque was the Director of Lands and Surveys. (para 36)

(6) Although it was the second defendant who went to see the first defendant, the letters that were written and the client's account were in the name of the fourth defendant which the third defendant was a partner of at the material time. That was the basis of the liability. There was no doubt that Isamaju received the lion's share of the proceeds of the cashier's cheque but that did not in any way detract from the fact that the whole proceeds were first received by the fourth defendant. (paras 39 & 41)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah satu rayuan oleh perayu/defendan terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden/plaintif dan memasuki penghakiman terhadap defendan. Plaintif memulakan dua kausa tindakan terhadap defendan di Mahkamah Tinggi, iaitu, bahawa mereka bertanggungjawab untuk bertanggungan bagi jumlah sebanyak RM4,125,000 sebagai pemegang amanah konstruktif atas alasan mengetahui penerimaan dan jumlah sebanyak RM4,125,000 atau RM206,205 adalah wang yang ada dan diterima oleh defendan kedua dan keempat untuk penggunaan plaintif. Dalam rayuan ini, defendan membuat aduan bahawa

plaintif tidak menamakan Isamaju Sdn Bhd ('Isamaju') sebagai pemegang amanah konstruktif yang telah menerima sebahagian besar wang tetapi sebaliknya, memutuskan untuk menamakan defendan kedua dan keempat sebagai pemegang amanah konstruktif atas alasan mengetahui penerimaan. Defendan menghujahkan, antara lain, bahawa: (i) alasan penghakiman menunjukkan, Pesuruhjaya Kehakiman ('PK') membuat andaian kausa tindakan adalah liabiliti aksesori; (ii) mereka tidak menerima wang yang terkandung dalam cek juruwang untuk manfaat mereka, di mana, daripada RM4,125,000 mereka hanya mendapat manfaat RM206,250 yang dibayar sebagai yuran mereka; (iii) plaintif bukan pemilik benefisial wang itu; dan (iv) PK terkhilaf apabila memutuskan bahawa defendan kedua telah berkelakuan tidak jujur apabila beliau gagal membuat pertanyaan, selepas diberi notis tentang cek juruwang. Selanjutnya, telah dihujahkan, bahawa Mahkamah Tinggi mendapati tiada ketidakjujuran terhadap defendan ketiga dan oleh itu, adalah salah untuk membuat dapatan liabiliti terhadap defendan ketiga. Defendan akhirnya menegaskan bahawa tiada kes dibuat terhadap mereka untuk wang yang ada dan diterima untuk kegunaan plaintif kerana bukan defendan keempat yang menerima wang cek juruwang tetapi Isamaju yang berbuat demikian. Plaintif, sebaliknya, mendakwa adalah tidak adil untuk defendan kedua atau keempat untuk mengekalkan manfaat cek juruwang berdasarkan kelakuan tidak jujur atau tidak wajar defendan kedua.

Diputuskan (menolak rayuan)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Pesuruhjaya Kehakiman tidak berandaian bahawa kausa tindakan plaintif adalah liabiliti aksesori. Bacaan perenggan 23 daripada pernyataan tuntutan menunjukkan bahawa tuntutan plaintif berdasarkan alasan mengetahui penerimaan adalah tuntutan tambahan atau alternatif.

(2) Defendan kedua, dengan pengetahuan bahawa cek juruwang adalah 'tidak boleh diniagakan' dan dibayar kepada Pengarah Tanah dan Ukur untuk sejumlah wang yang besar, dalam pembayaran premium tanah akan diberi notis tentang keteraturan arahan Isamaju untuk menunaikan cek juruwang dan dibayar hasil. Dengan tidak membuat pertanyaan tetapi

sebaliknya mendapatkan plaintif untuk membuka akaun bagi memudahkan pembayaran hasil cek juruwang ke dalam akaun, adalah jelas merupakan aksesori dan diberikan pengetahuan bantuan kepada kelakuan frod Isamaju yang menuntut untuk dibayar wang yang sepatutnya dibayar kepada Pengarah Tanah dan Ukur di mana adalah jelas merupakan tindakan pecah amanah.

(3) Defendan kedua dan keempat telah bertindak 'sebagai sebuah saluran yang dana dilupuskan dalam pecah amanah konstruktif yang mencapai tempat lain'. Yang arif hakim mendapati bahawa kelakuan defendan kedua adalah tidak jujur dan bergantung kepada apa yang dikatakan oleh Majlis Privi dalam *Royal Brunei Airlines Sdn Bhd v. Tan* yang dimaksudkan dengan ketidakjujuran.

(4) Orang asing atau ejen yang menerima sebahagian daripada harta amanah tidak boleh melepaskan diri daripada liabiliti. Walaupun defendan kedua dan keempat tidak menyimpan kesemua wang yang dibayar ke dalam akaun pelanggan mereka, mereka pasti mendapat manfaat daripada penerimaan kesemua wang amanah yang sebahagiannya mereka simpan sebagai yuran mereka. Setelah memperolehi bayaran wang ke dalam akaun pelanggan mereka, PK mendapati bahawa defendan kedua tidak jujur di mana ia dikaitkan dengan keseluruhan transaksi. Defendan kedua dan keempat telah menerima wang tersebut untuk kepentingan mereka sendiri, iaitu, dengan berbuat demikian, mereka boleh memperoleh yuran mereka. Hakikat bahawa sebahagian besar daripada wang yang kemudiannya dibayar kepada Isamaju tidak menjejaskan fakta bahawa defendan kedua telah bertindak secara tidak jujur dan mendapat manfaat daripada penerimaan wang dengan mengenakan yuran.

(5) Seorang peguam tidak boleh mengabaikan arahan anak guamnya tidak kira betapa salah arahan anak guamnya itu. Berdasarkan keterangan, ia menunjukkan bahawa defendan kedua mengetahui bahawa cek juruwang adalah 'tidak boleh diniagakan' dan penerima cek juruwang adalah Pengarah Tanah dan Ukur.

(6) Walaupun defendan kedua yang telah berjumpa dengan defendan pertama, huruf yang ditulis dan akaun pelanggan adalah pada nama defendan keempat di mana defendan ketiga merupakan rakan kongsi pada masa material. Itu adalah asas liabilitinya. Tiada keraguan bahawa Isamaju menerima sebahagian besar daripada hasil cek juruwang tetapi itu tidak sama sekali menjejaskan fakta bahawa semua hasil diterima dahulu oleh defendan keempat.

Case(s) referred to:
Adams v. Bank of New South Wales [1984] 1 NSWLR 285 ***(refd)***
Barnes v. Addy [1874] LR 9 Ch 244 ***(refd)***
International Sales and Agencies Ltd v. Marcus [1982] 3 All ER 551 ***(refd)***
Royal Brunei Airlines Sdn Bhd v. Tan [1995] 3 All ER 97 ***(refd)***

For the appellants - Chung Jiun Dau; M/s Chung & Assocs, Advocs
For the respondent - Celestina Stuel Galid; M/s Jayasuriya Kah & Co, Advocs

[Appeal from High Court, Kota Kinabalu; Civil Case No: K22-109-2006]

Reported by Shah Saharudin

JUDGMENT

Clement Skinner JCA:

Introduction

[1] We had earlier dismissed the appeal of Damianus George Aludah ("first appellant"), Anthony Chong Kong Ping ("second appellant") and Anthony Chong Aludah & Co ("third appellant") against the decision of the High Court, Kota Kinabalu, Sabah given on the 27 April 2010 allowing the claim of Malayan Banking Berhad ("the respondent") and entering judgment against the appellants.

[2] At the High Court the respondent was the plaintiff while the first, second and third appellants here were the second defendant, third defendant and fourth defendant respectively in the court below. The first defendant was one Michael George Labadin, the former manager of the respondent bank. He did not appeal against the decision of the High Court.

[3] It will be more convenient to continue to refer to the parties by the position they occupied in the High Court.

[4] These are our reasons for dismissing the appellants' appeal.

The Facts

[5] The facts leading up to this suit are set out in the judgment of the learned Judicial Commissioner who heard the suit. It will be convenient to adopt what he said:

> On 15.05.2003, Isamaju Sdn Bhd (Isamaju) was offered a parcel of land measuring more or less 33,000 acres situated in Sungai Pengat North, Labuk/Sugut District by the Lands and Surveys Department (exhibit P17). On 2.8.2003, Rangkaian Temuran Sdn Bhd (Rangkaian) entered into a Sale and Purchase Agreement (exhibit D1) with Isamaju to purchase this parcel of land. Pursuant to the Sale and Purchase Agreement, Rangkaian released a Cashier's cheque to Isamaju in a sum of RM4,125,000.00 as part of the purchase price payable to Rangkaian to Isamaju.
>
> The Cashier's cheque was dated 23.10.2003 and non-negotiable was made out in the name of the Director of Lands and Surveys Department in the sum of RM4,125,000.00 (at page 2 of ABD). It was to be used to pay 25% of the premium for the land to the Lands and Surveys Department. Isamaju forwarded the Cashier's cheque to its solicitors, the 4th Defendant, *vide* a letter dated 28.10.2003 (exhibit P 16) and instructed them to deposit the Cashier's cheque into the 4th Defendant's Client Account. By a letter dated 29.10.2003 (exhibit P 18), Isamaju instructed the 4th Defendant to pay out the proceeds of the Cashier's cheque to Isamaju. The 2nd and 3rd Defendant were at the material time the partners of the 4th Defendant. The 4th Defendant opened its Client's Account with the Plaintiff's branch at Jalan Perpaduan, Kota Kinabalu on 29.10.2003. The 1st Defendant was the Manager of the Plaintiff's branch at Jalan Perpaduan.
>
> On 3.11.2003, the 2nd Defendant met with the 1st Defendant at the 1st Defendant's Office and handed over the Cashier's cheque to the 1st Defendant to be deposited into the 4th Defendant's Client's Account. The 2nd Defendant also handed over to the 1st Defendant the 4th Defendant's letter dated 3.11.2003 (page 4 ABD). The pay-in slip to bank in the Cashier's cheque was prepared by the 1st Defendant's secretary on the instructions of the 1st Defendant. Upon clearance of the Cashier's cheque, the 4th Defendant paid out the proceeds from the Cashier's cheque to Isamaju in accordance to Isamaju's instructions and also

towards payment of its legal fees (pages 6 to 9 of ABD). However the sale and purchase between Rangkaian and Isamaju fell through and the Plaintiff received a letter of demand dated 17.12.2003 issued by Messrs Kumar & Co on behalf of Rangkaian *inter alia* alleging conversion of the cashier's cheque (exhibit P6). Rangkaian instituted High Court Suit No. SK 22-176-2004 against the plaintiff for conversion of the cashier's cheque (pages 10 to 15 of ABD) and on 19.10.2005, Rangkaian entered judgment against the plaintiff in the sum of RM4,125,000.00 with interest thereon at the rate of 8% per annum from 3.11.2003 until full payment (pages 16-29 of ABD). The Plaintiff paid the judgment sum together with interest totaling RM4,923,378.77 under protest on 6.4.2006 (exhibits P 13A, P 13B and P 13C).

The Plaintiff filed suit No. 22-209 of 2006 against the 1st, 2nd, 3rd and 4th Defendants *inter alia* for a declaration that the Defendants are liable to account to the Plaintiff for the sum of RM4,125,000.00 plus interest and costs. The Plaintiff filed a separate suit K 22-72 of 2007 against the 1st Defendant for similar reliefs. In the second suit, the 1st Defendant has counterclaimed against the Plaintiff for damages for wrongful dismissal. The 2 suits have been consolidated for trial.

The High Court Decision

[6] At the High Court the parties had identified the following issues for trial.

[7] As between the plaintiff and the first defendant the issues were:

(a) whether the first defendant had breached the terms and conditions of his employment with the plaintiff when he authorised the deposit of the "not negotiable" cashier's order No. 849762 in the name of the Director of Lands into the fourth defendant's client's account;

(b) whether the first defendant was in breach of trust and/or in breach of his fiduciary duties to the plaintiff when he authorised the deposit of the said cashier's cheque into the fourth defendant's client's account;

(c) whether in his capacity as the then manager of the plaintiff's Jalan Perpaduan, Kota Kinabalu branch, the first defendant had wrongly and/or unlawfully instructed the plaintiff's officers to collect the proceeds of the cashier's cheque and credit the same into the fourth defendant's client's account.

[8] As between the plaintiff and the second, third and fourth defendants, the agreed issues were:

(a) whether the plaintiff through the first defendant was negligent in accepting the cashier's cheque to be deposited into the fourth defendant's client's account;

(b) If the answer to the first issue is in the affirmative, then whether the same is a valid defence to the plaintiff's claim against the second, third and fourth defendants;

(c) whether the second defendant's dishonesty is apparent and/or may be inferred by the following facts and matters:

(i) at all material times, the second defendant had notice that the said cashier's cheque was "not negotiable" and that the payee was the Director of Lands and Surveys, and as such, being a professional, should have been put on inquiry on the impropriety of the transaction;

(ii) the cashier's cheque was for a substantial amount; and

(iii) the second defendant did not make any enquiries with the Lands and Surveys Department with regards to the cashier's cheque;

(d) whether the second defendant and/or the fourth defendant were liable to account to the plaintiff for the sum of RM4,125,000 as a constructive trustee on the ground of knowing receipt;

(e) whether the sum of RM4,125,000 or the sum of RM206,205 was money had and received by the second and/or fourth defendants to the plaintiff's use;

(f) whether the sum of RM4,125,000 or the sum of RM206,250 was paid under a mistake of fact in reliance of a fraudulent transaction and therefore.

The Findings Of The High Court

[9] As regards the first defendant, the learned Judicial Commissioner found that when the first defendant accepted employment with the plaintiff, by the terms and conditions of employment the first defendant was under a duty to act in good faith and to discharge the trust that was reposed in him as the branch manager in the best interests of the plaintiff.

[10] The learned Judicial Commissioner referred to the evidence on how the "non negotiable" cashier's cheque came to be paid into the fourth defendant's client's account. That evidence shows that on the second defendant handing the cashier's cheque to the first defendant, he instructed his secretary (PW1) to bank-in the cashier's cheque so PW1 wrote out the banking-in slip but the bank officers namely PW2 and PW3, who were requested to authorise the transaction refused to do so as it was against the plaintiff's standing instructions to refuse acceptance of third party "a/c payee" cheques or cashier's orders. So first defendant himself approved the transaction by putting his signature in the middle of the banking-in slip.

[11] The evidence also shows that when his Head Office began to query the transaction the first defendant informed headquarters in a series of emails that he had authorised the transaction on the 3 November 2003 on the basis of the second defendant coming to see him (first defendant) with the following documents:

(a) a letter (dated 3 November 2003) from the fourth defendant instructing the bank to pay the cashier's cheque into the fourth defendant's client's account;

(b) a letter (dated 7 October 2003) from the Director of Lands and Surveys Department confirming that it had appointed the fourth defendant as its solicitors;

(c) the first defendant's alleged conversation with the Director of Lands and Surveys who allegedly confirmed that all was in order.

[12] In relation to the matters referred to in (a), (b) and (c) above, the learned Judicial Commissioner found: that the letter from the fourth defendant had alerted the first defendant that it was a third party non-negotiable cashier's cheque that was to be deposited into the fourth defendant's account; that the first defendant had not told the truth about the letter dated 7 October 2003 from the Director of Lands and Surveys which the learned Judicial Commissioner found must have been backdated by the first defendant as the evidence showed that this letter was only received by the bank sometime in December 2003 and besides, the letter merely confirmed the appointment of the fourth defendant as its solicitors and did not authorise the cashier's cheque payable to

the Lands and Surveys to be deposited into the fourth defendant's clients account; and that the alleged conversation with the Director of Lands and Surveys was a bare allegation unsupported by any other evidence as the first defendant did not call the director or anyone else from the Lands and Surveys Department as witnesses regarding the alleged conversation.

[13] The learned Judicial Commissioner having reviewed the evidence found (at p. 14, record of appeal vol. 1):

> Therefore it was wrong for the 1st Defendant to authorize or justify the Cashier's cheque to be banked into the 4th Defendant's account. … He did not obtain any approval from his superior officers before he approved the transaction. The evidence shows that the 1st Defendant lied in his emails about the transaction. He also back-dated receipt of the letter from the Lands and Surveys Department. His series of actions was contrary to the terms and conditions of his contracts, against the Code of Ethics and Conduct and unlawful. These are not the acts of a negligent bank manager. These are the acts of a person who deliberately concealed and distorted the truth.

[14] With regard to the second, third and fourth defendants, the learned Judicial Commissioner found:

(a) The second defendant was not being truthful about his denial of any knowledge about the Director of Lands and Surveys letter of 7 October 2003 because the second defendant had said that one or two days after the cashier's cheque was presented for payment at the plaintiff's branch (on 3 November 2003), PW5 called the first defendant to inform him about the letter from the Director of Lands and Surveys Department, but this could not be true as the evidence of Jennifer, Theresa and Petira show that the director's letter only appeared at the bank in December 2003;

(b) That if the second defendant really did not know about the Director of Lands and Surveys letter, then on being handed the cashier's cheque by Isamaju with instructions to pay the proceeds to Isamaju, the second defendant would have been put on notice and should have made enquiries with Isamaju and the Director of Lands and Surveys whether the cashier's cheque should be paid to the director instead of being paid into fourth defendant's account;

(c) The evidence shows that the second defendant knew the cashier's cheque was "not negotiable" and that it was made payable to the Director of Lands and Surveys. The second defendant also knew from the sale and purchase agreement that the cashier's cheque was to pay land premium due to the Lands and Surveys Department and not meant to be paid to Isamaju or his law firm. According to the learned Judicial Commissioner, the cheque belonged to the Lands and Surveys Department;

(d) As a solicitor the second defendant should realise and have been put on notice about the propriety of paying the cashier's cheque into his firm's account as instructed by Isamaju, but the second defendant did not bother to make any enquiry with Isamaju or with the Lands and Surveys Department nor did he return the cheque to Isamaju or forward the cheque to the Lands and Surveys Department which it was intended for.

[15] Accordingly, based on the evidence before him the learned Judicial Commissioner found at p. 18 of the record of appeal vol. 1:

> The conduct of the 2nd Defendant to deposit the Cashier's cheque into his firm's account and then to pay out the proceeds to Isamaju and to his legal firm as legal fees notwithstanding that he knew it was made payable to the Director of Lands and Surveys towards payment of the land premium clearly shows that he intended to take and or misappropriate this sum of money. Without the assistance of the 1st Defendant, the Cashier's cheque could not be paid into his firm's account. His approach to the 1st Defendant to assist him to deposit the Cashier's cheque into his firm's account instead of paying it to the Director of Lands and Surveys again shows his intention to take the money. The 1st and 2nd Defendants knew that what they did was wrong but they went ahead with it. The evidence shows that they were dishonest in the transaction.

[16] The learned Judicial Commissioner then granted judgment against the second, third and fourth defendants in the terms prayed for.

This Appeal

[17] The second, third and fourth defendants contended before us that the plaintiff pursued two causes of action against them at the High Court, namely, (1) they were liable to account for the

sum of RM4,125,000 as a constructive trustee on the ground of knowing receipt; and (2) that the sum of RM4,125,000 or the sum of RM206,205 was money had and received by the second and fourth defendants to the plaintiff's use.

[18] The defendants pointed out that the plaintiff did not pursue Isamaju as constructive trustee who received the bulk of the money but instead had decided to pursue the second and fourth defendants as constructive trustee on the ground of knowing receipt.

[19] The defendants' submitted that in a case of knowing receipt, the courts have made a distinction between third parties who may become liable to account in equity for "knowing receipt" as distinct from "knowing assistance". The Privy Council in *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 3 All ER 97 at p. 99 stated that:

> … the first of these two circumstances in which third parties (non-trustees) may become liable to account in equity is 'knowing receipt', as distinct from the second where liability arises from 'knowing assistance'. Stated even more shortly, the first limb of Lord Selborne LC's formulation is concerned with liability of a person as a recipient of trust property or its traceable proceeds. The second limb is concerned with what, for want of a better compendious description, can be called the liability of an accessory to a trustee's breach of trust.

[20] The defendants next referred us to *International Sales and Agencies Ltd v. Marcus* [1982] 3 All ER 551 where it was stated:

> … there are two categories of persons, recipients of company's money who are treated as constructive trustees or may be treated as constructive trustees. The first category is the person who receives moneys held by a constructive trustee and receives those monies for his own benefit; … The second category is the constructive trustee who acts as a channel through which funds disposed of in breach of constructive trust reach other quarters, and it is clear from the authorities and from the passages in *Halsbury's Laws and Snell* that different considerations relate to the state of mind of the persons in the two categories.

[21] The defendants submitted that a claim in knowing receipt arises when property or monies to which a plaintiff is beneficially entitled is transferred to the defendant in breach of trust or fiduciary duty, and the plaintiff must establish the following:

(a) the defendant has received the property or monies for his own benefit;

(b) the plaintiff is beneficially entitled to the property or monies;

(c) the knowledge of the defendant in respect of the breach of trust or fiduciary duty.

[22] According to the defendants, the learned Judicial Commissioner misdirected himself on the law in failing to consider whether all the necessary elements to find the defendants liable as constructive trustee on the ground of knowing receipt were established. The defendants complained that the learned Judicial Commissioner failed to judicially appreciate the difference between knowing receipt and accessory liability. The defendants submitted that the learned Judicial Commissioner erred in law in treating the cause of action against the defendants for liability as constructive trustee to be based on accessory liability. This is despite para. 23 of the statement of claim explicitly stating that it was "on the ground of knowing receipt". Further, the defendants pointed out that agreed issue for trial No. 4 states that it was "on the ground of knowing receipt".

[23] The defendants complained that the grounds of judgment clearly show that the Judicial Commissioner had assumed that the cause of action was on accessory liability.

[24] We do not agree with the defendants' contentions and submissions. In our view the learned Judicial Commissioner did not assume that the plaintiff's cause of action was on accessory liability as alleged. A reading of para. 23 of the statement of claim shows that the plaintiff's claim based on the ground of knowing receipt was a further or alternative claim.

[25] The plaintiff's main claim as stated in para. 22 of its statement of claim is that it was unconscionable for the second or fourth defendant to retain the benefit of the cashier's cheque, is premised on the dishonest or improper conduct of the second defendant described in paras. 20 and 21 of the statement of claim.

[26] In our view the conduct of the second defendant complained of in paras. 20 and 21 of the statement of claim are in respect of "knowing assistance" or "accessory liability". These paragraphs allege that:

A (a) The second defendant knew that it was improper and wrongful for the plaintiff to collect the proceeds of the "not negotiable" cashier's cheque and credit the same into the third defendant's account.

B (b) The second defendant on receiving instructions from his client Isamaju would have been put on inquiry and should have made adequate inquiries regarding the propriety and true purport of the said cashier's cheque.

C (c) The cashier's cheque was not negotiable.

(d) It was made payable to the Director of Lands and Surveys Department.

(e) The cashier's cheque was for a substantial amount.

D (f) The second defendant failed to make inquiries as an honest and reasonable professional would have done in the circumstances.

(g) The second defendant should have informed the relevant authority regarding the cashier's cheque as there were E suspicious circumstances surrounding its intended transaction.

(h) That in Suit K 22-176-2004 brought against the plaintiff for conversion, the court there had described what the fourth defendant and first defendant had done as akin to a launder F of the cashier's cheque.

[27] In our view, the second defendant knowing that the cashier's cheque was "not negotiable" and was made payable to the Director of Lands and Surveys for a substantial amount of G money, in payment of land premium (since the second defendant was in possession of the sale and purchase agreement) would have been put on notice as to the propriety of Isamaju's instructions to cash the cashier's cheque and be paid the proceeds. The second defendant by refraining from making the H necessary enquiries but instead going to the plaintiff to open an account so as to facilitate the payment of the proceeds of the cashier's cheque into that account, was clearly an accessory to and had rendered knowing assistance to Isamaju's fraudulent conduct of seeking to be paid the monies meant to be paid to the I Director of Lands and Surveys and which conduct was clearly in breach of trust.

[28] As we indicated in an earlier part of this judgment, the learned Judicial Commissioner had made clear findings of fact that the second defendant had conducted himself in the manner complained about by the plaintiff.

[29] In our view the second and fourth defendants had acted "as a channel through which funds disposed of in breach of constructive trust reach other quarters" (see *International Sales and Agencies Ltd v. Sharas* (*supra*)). The learned judge found that the second defendant's conduct was dishonest and relied on what was said by the Privy Council in *Royal Brunei Airlines Sdn Bhd v. Tan* (*supra*) on what is meant by dishonesty. We see no error in the learned Judicial Commissioner having done so.

[30] With regard to the alternative claim against the defendants based on knowing receipt, we do not agree with the defendant's contention that the elements to establish that cause of action were not established.

[31] According to the defendants they did not receive the monies comprised in the cashier's cheque for their own benefit. The defendants say that out of the RM4,125,000 they only benefited to the extent of RM206,250 which was paid as their fees, therefore they cannot be said to have received the money for their own benefit. We do not agree. In *Barnes v. Addy* [1874] LR 9 Ch 244 at p. 251-252 the court stated:

> That responsibility (of a trustee) may no doubt be extended in equity to others who are not properly trustees, if they are found … actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que* trust. But … strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.

[32] It is clear from the above passage that a stranger or agent who receives some part of the trust property cannot escape liability. It is plain for us to see that even though the second and fourth defendants did not retain the whole of the monies that was paid into their client's account, they certainly benefited from having received all of the trust monies as they kept a portion of it

as their fees. In having obtained payment of the monies into their client's account, the learned Judicial Commissioner found that the second defendant had behaved dishonestly. In our judgment that dishonestly related to the whole transaction. The fact that the second and fourth defendants benefited from only a small portion of it is irrelevant to the basis on which liability attaches to them.

[33] Learned counsel for the defendants submitted that the depositing of monies by a solicitor into a trust account cannot be said to be money received by the solicitor for his own benefit. In support learned counsel referred us to the Australian case of *Adams v. Bank of New South Wales* [1984] 1 NSWLR 285 at 290. We decline to follow that case. It is distinguishable on its facts from this case. Each case must be decided on its own facts and here, it clearly shows that the second and fourth defendant did receive those monies for their own benefit, in that, by doing so, they were able to earn their fees. The fact that the bulk of the monies were then paid out to Isamaju does not detract from the fact that the second defendant had acted dishonestly and had benefited from the receipt of those monies by charging their fees.

[34] The defendants next contended that the plaintiff is not the beneficial owner of the money. According to the defendants only the beneficial owner is entitled to take action to make a person liable as constructive trustee on the grounds of knowing receipt. In this case, the beneficial owner of the money is Rankaian and so the plaintiff has no cause of action against the defendants.

[35] We do not agree. It may have been incorrect for the learned Judicial Commissioner to say that the cashier's cheque belongs to the Director of Lands and Surveys. A more correct description would have been that the Director of Lands and Surveys was the intended payee or beneficiary of the money of the cashier's cheque. Be that as it may, in our view the plaintiff was entitled to bring this action. Although in Suit K 22-176-2004 the court found that Rankaian was the "true owner" of the monies evidenced in the cashier's cheque, in that, if that cashier's cheque was not negotiated, it would have to be given back to Rankaian, the evidence is that the cashier's cheque was negotiated by the plaintiff by presenting it for payment to Alliance Bank and collecting the proceeds, which it then paid into the fourth defendant's client's account. The plaintiff in the circumstances of this case certainly has a right as beneficial owner to bring action against the defendants.

[36] The defendants next contended that the learned Judicial Commissioner had erred in finding that the second defendant had behaved dishonestly when the second defendant failed to make proper enquiries, after being put on notice about the cashier's cheque. According to the defendants, the second defendant could not disregard the clear instructions of his client Isamaju, based on the authority *Adams v. Bank of New South Wales* (*supra*).

[37] We see no merit in this contention. It cannot be the law that a solicitor cannot disregard the instructions of his client no matter how wrongful the instructions of his client may be. On the evidence here, it shows that the second defendant knew that the cashier's cheque was "not negotiable" and that the payee or beneficiary of the cashier's cheque was the Director of Lands and Surveys. In such circumstances the second defendant was certainly put on notice as to the propriety of Isamaju's instructions to pay the proceeds of the cashier's cheque into the fourth defendant's client's account and thereafter pay the monies out to Isamaju, except for RM206,250 which was paid to the fourth defendant as their fees. As the Privy Council said in *Royal Brunei Airlines v. Tan* (*supra*), "… an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something which he rather not know, and then proceed regardless". Surely, the dishonest acts described by the Privy Council do not somehow become innocent acts simply because a solicitor is acting at the behest of his client.

[38] In our judgment the learned judge was correct to find that the second defendant had acted dishonestly.

[39] The defendants contended that the High Court made no finding of dishonesty against the third defendant and therefore it was wrong to find liability against the third defendant.

[40] We see no merit in this contention. Although it was the second defendant who went to see the first defendant, the letters that were written and the client's account were in the name of the fourth defendant which the third defendant was a partner of at the material time. That was the basis of his liability.

[41] The defendants finally contended that no case had been made against them for money had and received for the plaintiff's use as it was not the fourth defendant who received the monies under the cashier's cheque but it was Isamaju who had done so. According to the defendants, the underlying basis for an action for money had and received is unjust enrichment, but the defendants were not unjustly enriched as the money received was not for their own benefit.

[42] We find no merit in this submission. No doubt Isamaju received the lion's share of the proceeds of the cashier's cheque but that does not in any way detract from the fact that the whole proceeds were first received by the fourth defendant. Further the second, third and fourth defendants were unjustly enriched and benefited by being paid fees for the second defendant's dishonest acts.

[43] It was for all the above reasons that we dismissed the appeal and affirmed the decision of the High Court.